



## MEMORANDUM OF AGREEMENT

AMONG THE

NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES



AND

THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION



AND

THE UNITED STATES ARMY CORPS OF ENGINEERS, WILMINGTON DISTRICT

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This Memorandum of Agreement (MOA) is entered into by the North Carolina Department of Environment and Natural Resources (hereinafter "NCDENR"), the North Carolina Department of Transportation (hereinafter "NCDOT"), and the United States Army Corps of Engineers, Wilmington District (hereinafter "USACE"), to establish the procedures for providing compensatory mitigation through the NCDENR Ecosystem Enhancement Program (EEP) to offset impacts to waters and wetlands due to activities authorized by Clean Water Act permits.

### **I. Purpose of MOA**

A. This MOA is an extension of the concept and agreements in principle of the Memorandum of Understanding among the NCDENR, NCDOT, and USACE, dated June 12, 2002. The purpose of this MOA is to establish the procedures and guidelines for coordination between the USACE and NCDENR, acting through the EEP, concerning compensatory mitigation requirements for permits authorized under Section 404 of the Clean Water Act, 33 USCA § 1344 and Section 10 of the Rivers and Harbors Act, 33 USCA § 403. Compensatory mitigation is defined as the restoration, enhancement, creation, and/or preservation of wetlands or other waters of the United States needed to offset the unavoidable loss or degradation of waters of the United States due to activities authorized by Clean Water Act permits. The terms restoration, enhancement, creation, and preservation as used in

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this MOA shall be defined in accordance with the Federal Guidance for the Establishment, Use and Operation of Mitigation Banks, 60 Fed. Reg. 58605.

B. This MOA addresses the substantial compensatory mitigation needs generated by the transportation program administered by the NCDOT within the State of North Carolina. The three signatory agencies agree that mitigation for these transportation projects should occur before impacts and should be planned and executed in a comprehensive manner considering both the ecological needs within the relevant watershed and anticipated NCDOT impacts within that watershed.

C. This MOA does not address an in-lieu-fee compensatory mitigation program for permittees other than NCDOT; those permittees will continue to be covered under the existing Memorandum of Understanding between the NCDENR/WRP and the USACE, dated November 8, 1998.

## **II. Authority**

A. The Secretary of the Army is charged with administering Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. The Secretary of the Army has delegated Section 404 and Section 10 permit authority to the Corps of Engineers. Permits issued under these authorities generally require compensatory mitigation to replace aquatic resource functions and values that are unavoidably lost as a result of those permits. In lieu fee mitigation occurs where a permittee provides funds to an in lieu fee sponsor instead of either completing project specific mitigation or purchasing credits from a mitigation bank. Compensatory mitigation objectives and guidance are provided in Corps of Engineers regulations and the following guidance documents:

- 1990 Memorandum of Agreement between the Environmental Protection Agency and The Department of the Army concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines.

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- November 28, 1995 Federal Guidance on the Establishment, Use and Operation of Mitigation Banks
- October 2000, Federal Guidance on the Use of In-Lieu-Fee Arrangements for Compensatory Mitigation under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act.
- December 26, 2002 Regulatory Guidance Letter, Subject: Guidance on Compensatory Mitigation Projects for Aquatic Resource Impacts Under the Corps Regulatory Program Pursuant to § 404 of the Clean Water Act and § 10 of the Rivers and Harbors Act of 1899.

B. The NCDENR Ecosystem Enhancement Program is the refocused and renamed non-regulatory program that includes the current organization executing the North Carolina Wetlands Restoration Program (WRP) required by NCGS 143-214.8 through N.C.G.S. 143-214.13. The WRP has been administered to protect and improve water quality, flood prevention, fisheries, wildlife and plant habitats, and recreational opportunities through the restoration, enhancement and preservation of wetlands and riverine areas within North Carolina's water basins, and will now be improved and administered by the EEP. The EEP will function consistently with the WRP laws and mandates, and will be fully integrated with the existing water quality and habitat plans of the NCDENR.

### **III. Purpose and Mission of the Ecosystem Enhancement Program**

A. The purpose of the EEP is to provide a comprehensive, natural resource enhancement program that identifies ecosystem needs at the local watershed level and preserves, enhances, and restores ecological functions within the target watersheds while addressing impacts from anticipated NCDOT transportation projects. All ecological enhancement activities are to be undertaken by the NCDENR with participation by State and Federal agencies and will be eligible for funding through multiple sources, including, but not limited to, programmed transportation funding. The goal of the EEP

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is to provide effective protection of the natural resources of the State by assessing, prioritizing, restoring, enhancing and preserving ecosystem functions and providing compensatory mitigation for development impacts by addressing watershed or basin needs and developing enhancement projects where the most benefit would be experienced. An additional goal of the EEP is to advance environmental stewardship through the identification of unique enhancement opportunities that, if implemented, would provide substantial benefit and protection to the natural resources of the State of North Carolina.

B. The EEP mission is to restore, enhance, preserve and protect the functions associated with wetlands, streams and riparian areas including but not limited to those necessary for the restoration, maintenance and protection of water quality and riparian habitats throughout North Carolina. The goals of the EEP are to:

- Execute the requirements placed on the NCDENR by the North Carolina Wetlands Restoration Program Act (NCGS 143-214.8, et seq.)
- Enhance the natural resources of North Carolina by addressing watershed needs.
- Fully satisfy compensatory mitigation requirements for authorized impacts on a programmatic, watershed-level basis.
- Provide in-ground, functioning compensatory mitigation for authorized impacts in advance of the actual impacts.
- Satisfy the compensatory wetland, stream and buffer mitigation needs of the NCDOT transportation program.
- Provide a means for organizing, steering, funding, and implementing ecosystem enhancement efforts in the State of North Carolina

## **IV. Watershed Restoration Plans and Watershed Needs Assessment**

A. NCDENR will review and revise the watershed restoration plans for each of the 17 river basins in North Carolina on a 5-year planning cycle as a component of the NC Division of Water Quality's Basinwide Water Quality Plans.

B. NCDENR will use the plans to identify basinwide ecological needs as well as restoration, creation, enhancement and preservation opportunities, and to provide a focus for the development of local watershed plans using a GIS Needs Analysis Methodology. The purpose of the methodology is to determine the current ecological condition of the structure and function of both the river basin and the local watersheds within those basins. Structure is the distribution and characteristics of the physical, biological, and chemical ecosystem components. Function is the results/outputs of the interaction of the physical, biological, and chemical (structural) components, including external factors of the ecosystem. The existing WRP basinwide plans and currently used assessment procedures and methodology will be used and relied upon until updated watershed needs and functional assessment methodologies are adopted by review teams that include NCDENR, NCDOT, USACE, USFWS, EPA, USFS, FHWA, and NCWRC. The methodology developed will be coordinated with and subject to concurrence by the signatory agencies.

1. As a first step, NCDENR will conduct a screening analysis of the 51 eight-digit cataloguing units (CU's) within North Carolina's 17 river basins in which substantial impacts to waters and wetlands from NCDOT projects are anticipated. The screening analysis will include, at a minimum, a multi-parameter evaluation of the status and potential needs for each of the following: water quality, aquatic and terrestrial habitat, and hydrologic functions. The screening analysis will be used to identify local watersheds, which are 14-digit cataloguing units, needing a more comprehensive assessment (targeted local watersheds) because of the watersheds' current condition and/or projected future impacts to it.

2. Second, the NCDENR will conduct a comprehensive Watershed Needs Assessment of targeted local watersheds whose current and potential conditions have been identified during the screening analysis. The Watershed Needs Assessment of targeted local watersheds will identify specific actions necessary to achieve desired local watershed goals. NCDENR will use the Watershed Needs Assessment information in conjunction with the

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watershed restoration plans and solutions for anticipated NCDOT transportation project impacts to determine the best location for either initiating or updating local watershed plans. NCDENR will also identify specific mitigation projects to address anticipated impacts from NCDOT projects identified in a 7-year projection of transportation impacts as part of local watershed plans.

C. NCDOT will provide NCDENR with an annual update of the 7-year projection of transportation impacts. When possible, the NCDOT will provide the type and location of anticipated impacts as part of those updates. NCDENR will confirm the type and quantity of existing and anticipated NCDOT project impacts within each eight-digit CU and identify potential mitigation needs.

D. The NCDENR EEP will identify available mitigation opportunities within targeted local watersheds, which are intended to provide compensatory mitigation for NCDOT projects. Multiple identification methods will be used, including but not limited to agency staff, on-call consultants, or requests for proposals to private mitigation providers. NCDENR will maintain oversight and control in the identification of available mitigation opportunities. The parties agree that successful mitigation projects within a targeted local watershed can reasonably be expected to provide appropriate compensation for impacts to wetlands and/or other aquatic resources within the eight-digit CU in which the targeted local watershed is located.

E. If NCDENR is unable to identify practicable adequate compensatory mitigation opportunities within a particular targeted watershed for an eight-digit CU, where future NCDOT project impacts are anticipated, it will screen all local watersheds within the CU for mitigation opportunities. NCDENR will present to the Program Assessment and Consistency Group (Assessment Group) information concerning all potential mitigation projects within the targeted watersheds, as well as other local watersheds within the CU so that the Assessment Group may recommend appropriate mitigation projects.

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F. If NCDENR is still unable to identify adequate compensatory mitigation opportunities, with or without receiving comments and recommendations from the Assessment Group, and the issuance of a Section 404 or Section 10 permit to NCDOT may jeopardize the letting schedule of a NCDOT project, NCDOT may propose to use alternate mitigation options, including, but not limited to, the existing NCDENR in-lieu-fee program or other mitigation providers, to satisfy the compensatory mitigation requirement.

### **V. Funding of the EEP**

NCDOT will fund the NCDENR EEP program, as described herein, by approving a biennial EEP budget, and, when appropriate, NCDOT will make payments into the Wetlands Restoration Fund, per NCGS 143-214.12 and 15A NCAC 2R .0400. NCDOT is committed, through this MOA, to using the EEP within NCDENR as the primary means by which NCDOT will acquire necessary compensatory mitigation to offset anticipated impacts from NCDOT projects. Accordingly, NCDOT and NCDENR agree to enter into a separate MOA detailing the funding mechanisms that will be necessary for EEP to operate an administrative staff responsible for the identification of watershed needs and mitigation opportunities associated with NCDOT project impacts as described herein.

NCDOT will provide the necessary funding to NCDENR to contract for the planning, acquisition, construction, long-term monitoring and management, and any necessary remediation of mitigation projects identified during the development of the watershed needs assessment, watershed restoration plans and local watershed plans. NCDOT agrees to fund a biennial budget of EEP based upon anticipated EEP administrative and capital expenditures, which will be annually reviewed. The biennial budget will be prepared by EEP within two months of receipt of the annual update of anticipated impacts as per paragraph IV C. NCDENR will provide a biennial work plan and its associated budget to NCDOT each year. After concurrence with the work plan, NCDOT will agree to fully fund the proposed budget. NCDENR will provide an annual budget summary to USACE. For every permit issued to NCDOT requiring use of the EEP to provide compensatory mitigation, NCDOT

shall, within 30 days of permit issuance, either certify sufficient funds have been provided to complete the required mitigation, or make available to NCDENR any deficiency in such funds.

**VI. Compensatory Mitigation Requirements**

A. Mitigation Sites. Using funds provided by NCDOT for that purpose, NCDENR shall manage or perform all planning, acquisition, construction, monitoring, remedial action, and preservation necessary to provide compensatory mitigation for impacts to waters and wetlands anticipated to be authorized by USACE permits. NCDENR shall complete such work within the time frames established in Section X of this MOA.

1. NCDENR shall prepare a site-specific mitigation plan for all proposed restoration, creation and enhancement compensatory mitigation projects, intended to provide compensatory mitigation requirements of Section 404 and Section 10 permits. Each such site specific mitigation plan shall be prepared in general compliance with the guidelines contained in Exhibit 1 of this document, if applicable, and shall include, but not be limited to, a pre-work description, assessment of cultural resources, and ecological assessment of the mitigation site; identification of the goals and objectives of the mitigation plan, including a description of the specific aquatic functions to be created, restored, or enhanced; the assessment methodology to be used; a description of the work to be performed on the site; a site acquisition and construction schedule; annual performance criteria and final success criteria to determine the success of the mitigation work; a monitoring plan to evaluate the site at least annually until success criteria have been met, a plan for addressing potential remediation needs in the event the site does not meet annual performance or success criteria; and a plan for the preservation and long-term management of the site. All work on such compensatory mitigation projects, including implementation of the preservation and long-term management of the site, shall be performed in accordance with the mitigation plan.



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2. For each restoration, creation and enhancement compensatory mitigation site, the NCDENR shall prepare annual monitoring reports until success criteria have been met, and a final report showing a site has met the success criteria specified in the mitigation plan.

3. For each preservation site acquired by the State of North Carolina through the EEP to satisfy mitigation requirements of Section 404 and Section 10 permits, prior to acquisition, NCDENR shall prepare a report generally describing the site. The report will describe for each site the ecological and watershed functions of the preservation site, and their importance to the region; demonstrable degradation threats; the long-term management plan; an explanation of the legal mechanisms to be used to preserve the site, including copies of any proposed real estate instruments; and a description of any easements or other encumbrances on the property. The State of North Carolina must have a sufficient interest in the proposed preservation property to ensure it is capable of preserving the property, or comply with the requirements of Section VIII below, prior to issuance of any permit utilizing said property as compensatory mitigation. NCDENR shall implement the preservation and long-term management described in the report for each preservation site. All real estate instruments necessary to implement preservation of the property must be properly executed and recorded within 30 days of issuance of a permit requiring such preservation as a condition.

4. NCDENR shall provide a copy of each site-specific mitigation plan, annual monitoring report, final report, and preservation report to the USACE, NCDOT, and each member of the Assessment Group, within 30 days of completion of the document. This requirement may be satisfied, at NCDENR's election, and with the consent of the receiving member of the Assessment Group, by posting such report on an accessible website, with e-mail notification to each recipient that such report has been posted.

5. NCDENR shall develop and maintain a website accessible to the general public and shall timely post all site-specific mitigation plans and preservation reports on the website.

B. USACE Permit Decisions. The parties to this MOA recognize that permit decisions regarding the need for and appropriateness of compensatory mitigation are to be made by the USACE

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within the permit process required for each proposed NCDOT project. The parties anticipate that the successful implementation of the EEP program will result in well-planned, high quality mitigation projects, which address the needs of local watersheds, and which will be completed and functioning in advance of impacts authorized by USACE permits. The parties further anticipate that with the successful implementation of the EEP program, most USACE permit decisions on NCDOT projects requiring compensatory mitigation will require utilization of EEP mitigation to fill that compensatory mitigation need.

1. The USACE will evaluate the EEP program at least annually. That evaluation will focus on the consistency of the EEP strategy with USACE regulations and guidelines for compensatory mitigation. The USACE will provide, in writing to EEP and NCDOT, any appropriate recommendations resulting from that evaluation.
2. The USACE will make decisions concerning compensatory mitigation requirements for permits or authorizations issued to the NCDOT as part of its decision on the individual permit or general permit authorization for each proposed project, in compliance with all applicable USACE regulations, guidance and the § 404(b)(1) guidelines.
3. If the USACE determines that compensatory mitigation is appropriate and required to offset authorized impacts to waters and wetlands, it will first consider whether there are practicable compensatory mitigation opportunities on-site of the proposed project. If the USACE determines that on-site mitigation opportunities are both practicable and environmentally preferable to existing mitigation available through the EEP program, the permit will be conditioned to require such on-site mitigation.
4. If the USACE determines that on-site mitigation is either not practicable or not environmentally preferable, and that the EEP has appropriate off-site mitigation to offset the permitted impacts, the USACE will condition the permit to identify the amount, type, and watershed location of compensatory mitigation required to be provided through the EEP program. It is the intention of the parties to this MOA that ultimately, mitigation provided through the EEP program will be complete and functioning prior to issuance of any permit

utilizing EEP for compensatory mitigation needs. Toward that end, all mitigation offered through the EEP pursuant to this MOA will comply with the performance schedule and timeline established in Section X, below, prior to issuance of any permit for which the mitigation is used to satisfy compensatory mitigation requirements.

5. For the purposes of this MOA, the following performance requirements must be met for any mitigation offered through EEP pursuant to this MOA:

a. For compensatory mitigation sites that are preservation only, the State of North Carolina has acquired a sufficient interest in the property to preserve the site in perpetuity, or to comply with the requirements of Section VIII, below, free and clear of all liens and encumbrances inconsistent with use of the site as compensatory mitigation and has prepared a long-term management plan. Within thirty days of issuance of the permit utilizing the preservation as mitigation, all steps necessary to permanently preserve the site in perpetuity must be completed, and the long-range management plan must be implemented.

b. With the exception of the EEP Transition Period, other compensatory mitigation sites (restoration, creation, and enhancement sites) must meet the performance requirements and timeline established in Section X below. In the event that a natural disaster prevents a mitigation project from meeting the time requirements established in Section X, the USACE may, in its discretion, modify the timeline.

6. If the EEP has no appropriate, completed mitigation projects that satisfy the anticipated compensatory mitigation requirements for any NCDOT project, NCDOT may propose to use alternate mitigation options including, but not limited to, the existing NCDENR in-lieu-fee program or other mitigation providers to satisfy the compensatory mitigation requirement.

7. At the time of issuance, the USACE will copy all permits or authorizations requiring utilization of the EEP program, issued to NCDOT to NCDENR EEP. Within 5 days of receipt of that permit, NCDENR will notify the USACE that NCDENR, and not the NCDOT, is

responsible for providing the compensatory mitigation required by the permit, and will take all actions necessary to complete implementation of the compensatory mitigation required by such permit or authorization. Failure of EEP to accept responsibility for providing the required compensatory mitigation may result in modification, suspension or revocation of the issued permit or authorization.

## **VII. Program Review**

A. NCDENR will convene the Assessment Group, which will provide oversight and review of the EEP in accordance with the October 2000 Federal Guidance on the Use of In-Lieu-Fee Arrangements for Compensatory Mitigation. In addition to NCDENR and USACE, State and Federal review agencies, including, but not limited to the Environmental Protection Agency, the US Fish & Wildlife Service, the National Marine Fisheries Service, the North Carolina Wildlife Resources Commission, North Carolina Department of Cultural Resources, and appropriate NCDENR divisions will be invited to be members of the Assessment Group. Each member agency will be requested to appoint a representative from its agency to attend meetings, provide comments, and receive all notices of meetings and other relevant correspondence or material.

1. The principal purpose of the Assessment Group is to facilitate the implementation of the EEP to realize the goal of providing quality, functioning, up front compensatory mitigation for all NCDOT projects for which compensatory mitigation is required.

2. NCDENR shall convene a meeting of the Assessment Group at least quarterly. The USACE shall chair all meetings of the Assessment Group. NCDENR shall make the report described in Paragraph VII.B. (EEP Assessment Report), below, available at least 30 days prior to the quarterly meeting.

3. It is not required that the Assessment Group approve site-specific mitigation plans/reports, monitoring reports, determinations that a site has met performance or success criteria, or any NCDENR planning actions, as a condition of use of the EEP as outlined in this MOA. The parties to this MOA intend that the members of the Assessment Group will review

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such documents and mitigation sites as each considers necessary to provide meaningful input, and express any recommendations, concerns, or potential improvements concerning the implementation of the EEP to NCDENR. Comments on the use of EEP to provide compensatory mitigation for particular permits will be made during the permit process for each permit.

B. The NCDENR will provide a quarterly EEP Assessment Report to the USACE, NCDOT and members of the Assessment Group that includes the following information: 1) projected impacts by amount, type, and eight-digit CU based on the 7 year anticipated impacts; 2) mitigation sites acquired by amount, type, and eight-digit CU and implementation status; 3) mitigation projects that are complete and functioning, or are otherwise available for use pursuant to Paragraph VI.B.5, above, by amount, type, and eight-digit CU; 4) mitigation projects that were debited by USACE permit Action ID, amount, type, and eight-digit CU; 5) net remaining mitigation by amount, type, and eight-digit CU for each complete and functioning mitigation project. The USACE shall review the EEP Assessment Report, as well as any comments of the Assessment Group, to determine program compliance and identify any necessary course corrections. Failure of the NCDENR to make any corrections identified in writing by the USACE in a timely manner could result in immediate termination of the use of the program for Section 404 compensatory mitigation. Notice of termination by the USACE pursuant to this paragraph shall be in writing and provided to NCDENR and NCDOT.

C. This MOA is written in terms of measuring authorized impacts and compensatory mitigation in terms of acreage (wetlands) and linear feet (streams). It is the goal of the parties to this MOA to develop or accept a scientifically acceptable and practicable method of measuring authorized impacts to wetlands and streams on the basis of functions lost, and compensatory mitigation in terms of functions gained. When the parties have agreed upon such a method of functional assessment, after notice and opportunity for comment on such functional assessment method, permit conditions will be written, and compensatory mitigation provided, in terms of functional replacement units, which will be reflected on the accounting reports prepared and provided by EEP.

**VIII. Protection of Mitigation Sites**

The EEP Transition and NCDENR will ensure that all mitigation sites that are used to satisfy compensatory mitigation requirements will remain within the public domain in fee simple title in perpetuity or that appropriate conservation easements in perpetuity, approved by the USACE, are placed on the sites and that sites will be managed in accordance with the long-term management plan included within the mitigation plan or report for the property. With approval by the USACE, NCDENR may transfer ownership or management responsibilities of mitigation site properties to appropriate non-profit conservation organizations, local governments, or land trusts for management and monitoring. In all cases, NCDENR will procure appropriate agreements to ensure that both public domain properties and other properties under conservation easements are maintained in perpetuity as viable compensatory mitigation sites serving the functions required by the permit.

**IX. EEP Transition Period**

A. Transition Period. In order for a smooth transition from the current WRP and NCDOT mitigation operations and methods to EEP watershed based operations and methods, a Transition Period is to be established as part of this MOA. The Transition Period begins on the effective date of this MOA and lasts for a period of two years (24 months). During the Transition Period, specific operational procedures will be followed for providing required compensatory mitigation for a select list of transportation projects. The purpose of the Transition Period is to allow sufficient time for aggressive planning to be completed by the EEP that will facilitate the development of advance compensatory mitigation. During the Transition Period, it is not required that mitigation be complete and functioning prior to permit issuance.

Only a select list of transportation projects, identified below as Exhibit 2, will be addressed by the Transition Period procedures. This list basically includes transportation projects expected to need permits within the 24 months following the execution of this MOA.

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B. EEP Transition Fiscal Management. The Wetlands Restoration Fund, established as a special trust fund pursuant to NCGS 143-214.12, will provide a repository for payments to satisfy compensatory mitigation requirements.

The NCDOT will provide funds for the acquisition of all mitigation sites and pay for construction, monitoring, maintenance, and management of all mitigation projects that are used as compensatory mitigation for impacts associated with transportation projects that are authorized by Section 404 and Section 10 permits. The EEP Transition staff and planning operations will be funded by NCDOT.

C. EEP Transition Operating Procedures (transition projects only).

1. During the Transition Period, the NCDENR EEP will provide through multiple procurement methods all compensatory mitigation required by USACE permits for the NCDOT projects identified on Exhibit 2. It is anticipated that all issued permits during the transition period will require compensatory mitigation at a ratio requiring at least 1:1 restoration. High quality preservation and enhancement may be accepted to supplement the 1:1 restoration requirement, if such use is consistent with USACE guidance on mitigation.

2. In the first twelve months of the Transition Period, where acceptable to the USACE after consideration of any public and agency comments, the Transition EEP will use mitigation projects currently being implemented to address compensatory mitigation requirements. In the event no appropriate restoration mitigation is available to provide compensatory mitigation at a 1:1 ratio for project impacts, the Transition EEP will complete planning and begin construction on mitigation sites approved by the USACE, sufficient to meet required restoration acres no later than twenty four months after the execution of this MOA.

3. Potential preservation sites will be identified based on a specific list of criteria agreed to by the USACE in consultation with members of the Assessment Group and other interested parties. The intent of the list of criteria is to identify the highest quality preservation sites that should be pursued, and to ensure that proposed preservation sites meet the requirements of USACE guidance on mitigation.

**X. EEP Milestones**

With the exception of NCDOT projects to be covered during the transition period, the NCDENR will comply with the following performance schedule and timeline prior to offering a mitigation site pursuant to this MOA to satisfy the compensatory mitigation requirements of any USACE permit. For the purpose of this Section, year 1 of this MOA shall begin on the effective date of this MOA.

A. NCDENR will use abbreviated basin plans and/or existing LWP's to plan and initiate mitigation projects for NCDOT projects scheduled to be permitted in year 3 of this MOA. For these mitigation projects, NCDENR will acquire and permanently preserve the mitigation property, complete the mitigation plan, and begin construction of the mitigation project prior to the end of year 3. Construction of these sites will be completed within one year of permit issuance for which the project serves as compensatory mitigation. The initial five-year monitoring period will begin upon completion of construction and monitoring and will continue until final success criteria have been achieved. All planning and implementation will be conducted with the goal of achieving final success criteria no later than the end of year 9 of this MOA.

B. NCDENR will use abbreviated basin plans and/or existing LWP's to plan and initiate mitigation projects for NCDOT projects scheduled to be permitted in year 4 of this MOA. For these mitigation projects, NCDENR will acquire and permanently preserve the mitigation property, complete the mitigation plan, and begin construction of the mitigation project prior to the end of year 4. Construction of these sites will be completed within one year of permit issuance for which the project serves as compensatory mitigation. The initial five-year monitoring period will begin upon completion of construction and monitoring and will continue until final success criteria have been achieved. All planning and implementation will be conducted with the goal of achieving final success criteria no later than the end of year 10 of this MOA.

C. NCDENR will use abbreviated basin plans and/or existing LWP's to plan and initiate mitigation projects for NCDOT projects scheduled to be permitted in year 5 of this MOA. For these



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mitigation projects, NCDENR will acquire and permanently preserve the mitigation property, complete the mitigation plan, and complete construction of the mitigation project prior to the end of year 5. The initial five-year monitoring period will begin upon completion of construction and monitoring and will continue until final success criteria have been achieved. All planning and implementation will be conducted with the goal of achieving final success criteria no later than the end of year 10 of this MOA.

D. By the end of year 5 of this MOA, using LWPs, NCDENR will acquire and permanently preserve the mitigation properties, complete the mitigation plans, and complete construction of mitigation projects to address projected impacts for NCDOT projects scheduled to be permitted in years 6, 7, and 8. The initial five-year monitoring period will begin upon completion of construction and monitoring and will continue until final success criteria have been achieved. All planning and implementation will be conducted with the goal of achieving final success criteria no later than the end of year 10 of this MOA.

E. By the end of year 6 of this MOA, using LWPs, NCDENR will acquire and permanently preserve the properties, complete the mitigation plans, and complete construction of mitigation projects to address projected impacts for NCDOT projects scheduled to be permitted in years 9, 10, and 11. The initial five-year monitoring period will begin upon completion of construction and monitoring and will continue until final success criteria have been achieved. All planning and implementation will be conducted with the goal of achieving final success criteria no later than the end of year 11 of this MOA.

F. By the end of year 7 of this MOA, using LWPs, NCDENR will acquire and permanently preserve the properties, complete the mitigation plans, and complete construction of mitigation projects to address projected impacts for NCDOT projects scheduled to be permitted in years 12, 13, and 14. The initial five-year monitoring period will begin upon completion of construction and monitoring and will continue until final success criteria have been achieved. All planning and implementation will be conducted with the goal of achieving final success criteria no later than the end of year 12 of this MOA.

G. Prior to use as mitigation for USACE permits, the mitigation projects referred to in paragraphs A through E of this Section shall meet all required annual performance criteria for each year of monitoring required to be performed prior to permit issuance.

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H. For NCDOT projects scheduled to be permitted in all years subsequent to year 12, mitigation projects offered pursuant to this MOA shall be complete and functioning in order to be eligible for use as compensatory mitigation for USACE permits. Complete and functioning shall mean that construction of the project has been completed, the site has met all final success criteria described in the site-specific mitigation plan, and has been preserved in perpetuity.

### **XI. Open Communication and Cooperation**

The USACE, NCDENR, and NCDOT management acknowledge that it is their desire to facilitate the processes set forth in this MOA by open communication and cooperation. All parties agree to exercise their rights and obligations in good faith as contained in this MOA. The parties further agree to ensure that formal continuous communication and outreach is established to ensure that parties affected by the EEP are apprised of the EEP's policies, methods, procedures, activities, and performance. The outreach includes, but is not limited to, continuous communication with:

- Regulatory review agencies (e.g. NCWRC, NMFS, EPA, USFWS)
- Interested agencies, organizations, and others (e.g. Legislature, Local Government, Natural Heritage, environmental groups, and general public)
- Supporting groups and organizations (e.g. NGO's, Private Mitigation Providers, CWMTF)

### **XII. Amendment and Termination**

Amendments to this MOA may be made with mutual agreement in writing by the signature agencies. In addition to the right to terminate contained in Paragraph VII of this MOA, this MOA may be terminated by a signatory party by giving ninety (90) days written notice to the other parties. Within thirty (30) days of such written notice of termination by any party, or within thirty (30) days of written notice of termination by the USACE pursuant to paragraph VII.B., NCDENR shall provide an accounting of payments received in satisfaction of compensatory mitigation requirements and funds disbursed for implementation of compensatory mitigation requirements. Notwithstanding any termination of this MOA, the NCDENR shall complete all restoration, creation, enhancement or

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preservation activities, including any required remediation, necessary to satisfy the compensatory mitigation requirements of the Section 404 and Section 10 permits for which NCDENR is responsible. The completion of such compensatory mitigation shall be accomplished in accordance with the project implementation schedule included within the relevant mitigation plan.

### **XIII. Effect on Permitting**

Nothing in this MOA shall abrogate or limit the regulatory decision authority of the USACE. NCDENR and its agencies routinely comment on permit applications made to USACE, and, in some cases, must issue or waive certifications or determinations prior to issuance of USACE permits. This MOA does not provide for NCDENR participation in the USACE decision to issue or deny a permit, or in the USACE decision concerning compensatory mitigation requirements for any issued permit, beyond that participation described in this paragraph.

### **XIV. Effective Date**

The effective date of this Memorandum of Agreement is the date of the last signature below.

DATE:

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William G. Ross, Jr.  
Secretary  
NCDENR

DATE:

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Lyndo Tippet  
Secretary  
NCDOT

DATE:

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Charles R. Alexander, Jr.  
Colonel, US Army  
District Engineer, Wilmington

**EXHIBIT 1**

WRP Mitigation Plan General Compliance Guidelines

**EXHIBIT 2**

Limited List of NCDOT Transportation Projects Addressed by the EEP Transition